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14 UNITED STATES DISTRICT COURT

15 EASTERN DISTRICT OF CALIFORNIA

16 ARNOLD ABRERA,

17 plaintiff,

18 v.

19 GAVIN NEWSOM, in his official capacity as
20 Governor of the State of California; ROB
21 BONTA, in his official capacity as Attorney
22 General of the State of California; ANNE
23 MARIE SCHUBERT, in her official capacity
24 as County of Sacramento District Attorney;
COUNTY OF SACRAMENTO; BOBBY
DAVIS, in his official capacity as Chief of the
Elk Grove Police Department; JONATHAN P.
HOBBS, in his official capacity as the City
Attorney for the City of Elk Grove; CITY OF
ELK GROVE;

defendants.

No. 2:22-cv-1162 JAM DB

**REPLY TO OPPOSITION TO
PLAINTIFF'S MOTION FOR A
PRELIMINARY
INJUNCTION AGAINST
DEFENDANTS GAVIN NEWSOM, in
his official capacity as Governor of the
State of California, and ROB BONTA, in
his official capacity as Attorney General
of the State of California**

**Constitutionality of State Statute
Challenge (RULE 132 (Fed. R. Civ. P.
5.1))**

Date: November 15, 2022

Time: 1:30 p.m.

Hon. Judge: John A. Mendez

Location: Courtroom 6, 14th floor

501 I Street

Sacramento, CA

Action Filed: July 5, 2022

25 **REPLY - INTRODUCTION**

26 Defendants do not oppose the requested declaratory and injunctive relief on the merits.

27 Instead, Defendants attempt to moot Plaintiff's claim and divest this court of jurisdiction by

1 manipulating the facts and ignoring the chilling effect the statute has on the attorney-client
2 relationship, which creates an inherent conflict of interest in an attorney becomes a *de facto* party
3 any Second Amendment case. (**Gorski Decl. Dkt. 19-2**, ¶s 18-20, 23, 27, 30, 33.)

4 As part of their opposition, Defendants cite a recent order (dkt # 23.) denying a motion for
5 preliminary injunction in *Defense Distributed v. Bonta*, No. CV 22-6200-GW-AGRx (C.D. Cal.
6 Oct. 24, 2022), relating in part to SB 1327. In that case, Defendant Bonta apparently made the
7 same promise not to use SB 1327, and apparently the same is true in another case. (e.g., Order in
8 *Renna v. Bonta* Case 20-cv-02190-DMS-DEB Document 60 (U.S. Dist. Ct., SD Cal. 09/30/22)).¹

9 In *People v. Abrera*, Case Number 21FE004857, after a prior continuance so the defendant
10 District Attorney could file an opposition, and after argument on the matter on October 31, 2022,
11 the judge ordered the parties back in court on December 2, 2022, for further argument and/or a
12 statement of decision for the return of two semi-automatic rifles. Defendants argue that AB 1327
13 does not apply to criminal proceedings. That is not what the statute says. (**Karalash Decl. ¶s 2-4.**)
14 It specifically targets any request for equitable relief, which is the same relief being sought in
15 *People v. Abrera*, which is an administrative action for the return of property; the criminal case
16 being dismissed by the court. The statute cannot be any clearer:

17 § 1021.11. (a) ... any person, ... attorney, or law firm, who seeks
18 declaratory ... relief to prevent this state, ... a governmental entity or
19 public official in this state, or a person ... from enforcing any statute, ... or
20 any other type of law that regulates or restricts firearms, ... is jointly and
21 severally liable to pay the attorney's fees and costs [emphasis added.]

22 **I. THE GOVERNMENT'S SO-CALLED "PROMISE" DOES NOT NEGATE THE**
23 **IRREPREABLE HARM AND RELIEF BEING SOUGHT.**

24 A "promise" from the government in an email that they won't seek attorney fees under Senate

25
26 ¹ If defendants have no intent of obtaining attorney fees, then why was SB 1327 passed so quickly? Defendants are
27 essentially arguing that they forced SB 1327 through the legislature with no intent of it being used – surely then, the
28 real purpose of the law is to act as a deterrent if there is no intent to enforce it. That alone is ground for it to be enjoined.

1 Bill (SB) No. 1327 is meaningless, given their intention to go on the “offensive” in Second
2 Amendment litigation by ramming SB 1327 through the legislature with the specific intent to
3 punish people like Plaintiff and his attorneys who dare to challenge a gun law. (**Gorski Decl.** ¶s
4 3-12, 16, 24-30; **Abrrera Decl.** ¶s 3-12, 16, 24-30; **Karalash Decl.** ¶ 8-19.) Besides, no other
5 government defendant in this case, or any other case, made the “promise” that they won’t seek
6 attorney fees under SB 1327.
7

8 A. Defendants attempt to manipulate Plaintiff’s Article III standing with a so-called
9 “promise” should not be countenanced by this Court, and since the issue is the
10 constitutionality of a state statute, Attorney General Bonta and Governor Newsom are
11 both necessary and proper parties because the other named county and municipal
12 defendants, who have not committed to the “promise”, lack authority to defend a state
13 statute.

14 Defendants’ “promise” defense was taken from the playbook of the State and City of New
15 York. The dissent by Justice Alito in *N.Y. State Rifle & Pistol Ass’n v. City of N.Y.*, 140 S. Ct.
16 1525, 1527-28 (2020) turns out to be a prophecy of things to come regarding the new defense of
17 “mootness” and lack of standing in Second Amendment cases:
18

19 By incorrectly dismissing this case as moot, the Court permits our docket
20 to be manipulated in a way that should not be countenanced. Twelve years
21 ago in *District of Columbia v. Heller*, 554 U. S. 570, 128 S. Ct. 2783, 171
22 L. Ed. 2d 637 (2008), we held that the Second Amendment protects the
23 right of ordinary Americans to keep and bear arms. Two years later, our
24 decision in *McDonald v. Chicago*, 561 U. S. 742, 130 S. Ct. 3020, 177 L.
25 Ed. 2d 894 (2010), established that this right is fully applicable to the
26 States. Since then, the lower courts have decided numerous cases
27 involving Second Amendment challenges to a variety of federal, state, and
local laws. Most have failed. We have been asked to review many of these
decisions, but until this case, we denied all such requests.

28 On January 22, 2019, we granted review to consider the constitutionality of
a New York City ordinance that burdened the right recognized in *Heller*.
Among other things, the ordinance prohibited law-abiding New Yorkers
with a license to keep a handgun in the home (a “premises license”) from
taking that weapon to a firing range outside the City. Instead, premises
licensees wishing to gain or maintain the ability to use their weapons safely
were limited to the seven firing ranges in the City, all but one of which
were largely restricted to members and their guests.

1 In the District Court and the Court of Appeals, the City vigorously and
2 successfully defended the constitutionality of its ordinance, and the law
3 was upheld based on what we are told is the framework for
4 reviewing Second Amendment claims that has been uniformly adopted by
5 the Courts of Appeals. One might have thought that the City, having
6 convinced the lower courts that its law was consistent with *Heller*, would
7 have been willing to defend its victory in this Court. But once we granted
8 certiorari, both the City and the State of New York sprang into action to
9 prevent us from deciding this case. Although the City had previously
10 insisted that its ordinance served important public safety purposes, our
11 grant of review apparently led to an epiphany of sorts, and the City quickly
12 changed its ordinance. And for good measure the State enacted a law
13 making the old New York City ordinance illegal.

14 Thereafter, the City and *amici* supporting its position strove to have this
15 case thrown out without briefing or argument. The City moved for
16 dismissal “as soon as is reasonably practicable” on the ground that it had
17 “no legal reason to file a brief.” Suggestion of Mootness 1. When we
18 refused to jettison the case at that early stage, the City submitted a brief but
19 “stress[ed] that [its] true position [was] that it ha[d] no view at all regarding
20 the constitutional questions presented” and that it was “offer[ing] a defense
21 of the . . . former rul[e] in the spirit of something a Court-appointed *amicus*
22 *curiae* might do.” Brief for Respondents 2.

23 A prominent brief supporting the City went further. Five United States
24 Senators, four of whom are members of the bar of this Court, filed a brief
25 insisting that the case be dismissed. If the Court did not do so, they
26 intimated, the public would realize that the Court is “motivated mainly by
27 politics, rather than by adherence to the law,” and the Court would face the
28 possibility of legislative reprisal. Brief for Sen. Sheldon Whitehouse et al.
as *Amici Curiae* 2-3, 18 (internal quotation marks omitted).

29 Regrettably, the Court now dismisses the case as moot. . . .

30 Because of the New York’s success in mooting *N.Y. State Rifle & Pistol Ass’n*, California is
31 following suit. Instead of upholding their oath to protect the Constitution, Defendants are abusing
32 their position of public trust for their own political machinations.

33 Plaintiff Abrera is not just seeking to enjoin State Defendants from using the fee-shifting
34 provision of SB 1327 against him in this case (contrary to Opposition p. 1, line 2), he is seeking
35 to have the statute “declared” unconstitutional because its mere presence on the books is
36 antithetical to the First Amendment due to its chilling effect on all potential plaintiff citizens
37 vindicating their rights under the Second Amendment as well as their attorneys.

1 In the words of Justice Jackson:

2 "The framers of the Constitution knew, and we should not forget today,
3 that there is no more effective practical guaranty against arbitrary and
4 unreasonable government than to require that the principles of law which
5 officials would impose upon a minority be imposed generally. Conversely,
6 nothing opens the door to arbitrary action so effectively as to allow those
7 officials to pick and choose only a few to whom they will apply legislation
8 and thus to escape the political retribution that might be visited upon them
9 if larger numbers were affected." *Railway Express Agency, Inc. v. New*
10 *York*, 336 U. S. 106, 112-113 (1949) (concurring opinion).

1 Under Article III of the Constitution, a suit seeking declaratory relief is justiciable in federal
2 court when "the facts alleged, under all the circumstances, show that there is a substantial
3 controversy, between parties having adverse legal interests, of sufficient immediacy and reality to
4 warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil*
5 *Co.*, 312 U.S. 270, 273 (1941). "The difference between an abstract question and a 'case or
6 controversy' is one of degree, of course, and is not discernible by any precise test." *Babbitt v.*
7 *United Farm Workers Nat'l Union*, 442 U.S. 289, 297, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979). In
8 making this evaluation, courts examine the immediacy of the threat of harm to a plaintiff in light
9 of the nature of the statute the plaintiff seeks to challenge. See, e.g., *Steffel v. Thompson*, 415 U.S.
10 452, 459 (1974).

11 We begin our analysis of this issue by pointing out that the Supreme Court
12 has often found a case or controversy between a plaintiff challenging the
13 constitutionality of a statute and an enforcement official who has made no
14 attempt to prosecute the plaintiff under the law at issue. In *Doe v. Bolton*,
15 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973), the Court found a
16 justiciable controversy between doctors subject to prosecution under
17 criminal abortion statutes and the state attorney general, "despite the fact
18 that the record does not disclose that any one of [the doctors] has been
19 prosecuted, or threatened with prosecution." *Id.* at 188. Recently,
20 in *Diamond v. Charles*, 476 U.S. 54, 106 S. Ct. 1697, 90 L. Ed. 2d 48
21 (1986), the Court stated that "the conflict between state officials
22 empowered to enforce a law and private parties subject to prosecution
23 under that law is a classic 'case' or 'controversy' within the meaning of Art.
24 III." *Id.* 106 S. Ct. at 1704.

25 The legal principle underlying these decisions is the familiar doctrine that
26

1 "[a] suit against a state officer in his official capacity is, of course, a suit
2 against the State." *Id.* at 1701 n.2. Thus a controversy exists not because
3 the state official is himself a source of injury, but because the official
4 represents the state whose statute is being challenged as the source of
5 injury. See *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 3105-06,
6 87 L. Ed. 2d 114 (1985). In sum, we conclude that a plaintiff challenging
7 the constitutionality of a state statute has a sufficiently adverse legal
8 interest to a state enforcement officer sued in his representative capacity to
9 create a substantial controversy when, as here, the plaintiff shows an
10 appreciable threat of injury flowing directly from the statute. [emphasis
11 added]

12 *Wilson v. Stocker*, 819 F.2d 943, 946-47 (10th Cir. 1987)

13 The Attorney General tries to distance himself from the state law, but a dispute with state's
14 passage of AB 1327 suffices to create a dispute with the state's enforcement officer sued in a
15 representative capacity. A controversy exists not because the state official is himself a source of
16 injury but because the official represents the state whose statute is being challenged as the source
17 of injury." *Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987).

18 B. Defendants' "Promise" fails to negate Plaintiff's injury-in-fact and liability exposure
19 in this case.

20 The gravamen of the Attorney General's argument in this case and in *Defense Distributed* is
21 that unless Plaintiff can show that the Attorney General will enforce the statute in this action,
22 there is no dispute with the Attorney General. The Attorney General has not, however, disclaimed
23 any intention of exercising his enforcement authority in other cases --- only in this case. In short,
24 Defendants are arguing to wait to see what happens in the future in another case as to State only.

25 It appears defendant Bonta is also adopting an old argument favored by the Attorney General
26 of the Commonwealth of Virginia 1988 and 1991. In *American Booksellers Association v.*
27 *Commonwealth*, 802 F.2d 691 (4th Cir. 1986), *questions certified*, 484 U.S. 383, 98 L. Ed. 2d
28 782, 108 S. Ct. 636, *vacated on other grounds*, 488 U.S. 905, 102 L. Ed. 2d 243, 109 S. Ct. 254
29 (1988), Virginia argued that booksellers could not challenge a new state antipornography law
30 until someone broke it and was punished. The 4th Circuit brushed the argument aside in a footnote

1 (802 F.2d at 694 n.4):

2 The facts of this case distinguish it from our recent decision in *Doe v.*
3 *Duling*, 782 F.2d 1202 (1986), which challenged on privacy grounds a
4 nineteenth century fornication statute which had not been enforced in
5 private homes for years, if not decades. In the instant case, the amendment
6 is newly enacted. It would be unreasonable to assume that the General
7 Assembly adopted the 1985 amendment without intending that it
8 be enforced.

9 The Supreme Court agreed (484 U.S. at 393):

10 We are not troubled by the pre-enforcement nature of this suit. The
11 State has not suggested that the newly enacted law will not be enforced,
12 and we see no reason to assume otherwise. We conclude that plaintiffs
13 have alleged an actual and well-founded fear that the law will
14 be enforced against them. Further, the alleged danger of the statute is,
in large measure, one of self-censorship; a harm that can be realized
even without an actual prosecution.

15 The Supreme Court's comments in *American Booksellers* apply squarely to
16 this suit. We see no reason to assume that the Virginia legislature enacted
17 this statute without intending it to be enforced. ...

18 *Mobil Oil Corp. v. Attorney Gen. of Va.*, 940 F.2d 73, 76-77 (4th Cir. 1991)

19 The state has not suggested that the newly enacted law will not be enforced by county and
20 municipal defendants in this case, and there is no reason to assume otherwise.

21 Moreover, assuming arguendo, without conceding the point that the State's (i.e. Newsom and
22 Bonta) promise somehow eliminates the "risk of injury" as to the State, Plaintiff still has Article
23 III standing to seek relief against the State because the State is the proper party, and only party,
24 Plaintiff can seek relief against because the State passed the law and Defendants Newsom and
25 Bonta are the only gatekeepers of the law --- and the only necessary and proper parties to defend
26 the laws constitutionality. Because the law on its face has a chilling effect, regardless of any
27 defendants' decision to exercise their right to seek fees under the law, Plaintiff is still injured
28 because of the laws deterrent effect.

29 A declaration and injunction striking the law down as unconstitutional against State
30 defendants will eliminate the risk of injury to Plaintiff when municipal defendants attempt to

1 exercise the power granted by AB 1327.

2 C. Defendants' citation to in *Defense Distributed v. Bonta*, No. CV 22-6200-GW-AGRx
3 (C.D. Cal. Oct. 24, 2022) actually supports Plaintiff's position.

4 First, the state was the only party in *Defense Distributed*. Unlike this case, whereby county
5 and municipal defendants are named as parties, and who can enforce SB 1327 against Plaintiff
6 and his attorneys in this case and any other case.

7 Second, when applying *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) in
8 *Defense Distributed*, the court stated at pages 3-4:

9 Defendants have made it clear that they have no intention of enforcing its
10 provisions against DD – i.e., seeking attorneys' fees and costs pursuant to
11 that authority – in connection with this litigation. Whatever that might or
12 might not mean with regard to mootness and/or standing, that is not the
issue here – for purposes of a preliminary injunction motion, it means that
DD faces no likely irreparable harm/injury.

13 The *Defense Distributed* ruling was limited to the fact that the state defendants were not
14 seeking attorney fees “... in connection with this litigation.” It did not address the chilling effect
15 SB 1327 had on the First Amendment. Most importantly, other than State of California
16 defendants, there were no other parties to that litigation.

17 In addition, at footnote 11, page 8, the court in *Defense Distributed* had this to say:

18 The Court would note that, but for Defendants' commitment not to pursue
19 attorneys' fees or costs from DD or its attorneys pursuant to Section 2 of
20 SB 1327 in connection with this action, it would entertain reservations as
to SB 1327's impact on DD's First Amendment rights. [emphasis added]

21 Therefore, the *Defense Distributed* court was not convinced of SB 1327's constitutionality
22 under the First Amendment and its chilling effect.

23 D. Defendants' “Promise” ignores the chilling effect SB 1327 has on the First and Second
24 Amendment and ignores the type of declaratory and injunctive relief being sought.

25 Unlike the plaintiffs in *Defense Distributed*, Plaintiff has made it perfectly clear that he is **not**
26 only seeking to enjoin the state from using SB 1327 against him in this case, or any other case he
27 may present, but he is also seeking a declaration from the Court finding that SB 1327 is

1 unconstitutional on its face because of its chilling effect from its mere presence of the books;
2 combined with the fact that it was just rushed through the legislature and Defendants statements
3 about going on the “offensive.”

4 In his Notice of Motion, Plaintiff makes this very clear:

5

- 6 • “Because SB 1327’s fee-shifting penalty is unconstitutional, Plaintiffs seek
declaratory and injunctive relief to invalidate Section 1021.11 and enjoin its
application.” (**Notice of Motion**, 3:24.)
- 7
- 8 • “Plaintiff seeks to declare C.C.P. § 1021.11 unconstitutional, and enjoin enforcement
of such law as-applied, and further as-written.” (**Notice of Motion**, 4:16.)
- 9
- 10 • “Plaintiff filed this civil rights action under 42 U.S.C. § 1983 for injunctive and
declaratory relief.” (**Notice of Motion**, 5:2.)

11 The Supreme Court has repeatedly found that declaratory judgments "closely
12 resemble" injunctive relief, the quintessential equitable remedy. *CIGNA Corp. v. Amara*, 563 U.S.
13 421, 440 (2011); see *California v. Grace Brethren Church*, 457 U.S. 393, 408-09 (1982) (holding
14 that the Tax Injunction Act "prohibits declaratory as well as injunctive relief" and noting that
15 "there is little practical difference between injunctive and declaratory relief").

16 Therefore, not only will a declaration from this Court finding SB 1327 unconstitutional stop
17 the chilling effect the statute has on Plaintiff and his attorneys in this case, it will also remove the
18 chilling effect it has on Plaintiff, his attorneys, other potential plaintiffs, and other potential
19 attorneys in both pending and future cases brought under the Second Amendment.

20 While injunctive relief generally should be limited to apply only to named plaintiffs where
21 there is no class certification, *see generally Zepeda*, 753 F.2d at 727-28 & n.1, "an
22 injunction is not necessarily made overbroad by extending benefit or protection to persons
23 other than prevailing parties in the lawsuit - even if it is not a class action - *if such breadth*
24 *is necessary to give prevailing parties the relief to which they are entitled.*" *Bresgal v.*
25 *Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (emphasis in original). While there are
26 only fourteen named plaintiffs in this case, spread among San Diego, Orange, Los
27 Angeles, and Ventura counties, and an unknown number of members of Easyriders, an
28 injunction against the CHP statewide is appropriate. Because the CHP policy regarding
helmets is formulated on a statewide level, other law enforcement agencies follow the
CHP's policy, and it is unlikely that law enforcement officials who were not restricted by
an injunction governing their treatment of all motorcyclists would inquire before citation
into whether a motorcyclist was among the named plaintiffs or a member of Easyriders,
the plaintiffs would not receive the complete relief to which they are entitled without

1 statewide application of the injunction.

2 *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996)

3 E. If SB 1327 is not declared unconstitutional on its face, an act of Congress (i.e., 42
U.S.C. § 1988) will be voided, and therefore, the injury is immediate.

4 It is well settled that Congress passed 42 U.S.C. § 1988 with the intent to incentivize private
5 attorneys to represent citizens who do not have the means to present meritorious civil rights
6 claims against state and municipal actors. It is also well settled law that 42 U.S.C. § 1988 is not a
7 two-way attorney fee provision. When Congress enacted § 1988, it was not for the purpose of
8 chilling a citizen's right to challenge the government's encroachment and infringement of
9 citizens' civil liberties. The purpose was just the opposite. The purpose was to give civil rights
10 attorneys an incentive to accept cases in which the actual damages may be minimal, but the
11 underlying cause noble, in order to protect and maintain the integrity of the Bill of Rights and the
12 United States Constitution. As such, the burden on prevailing defendants is high under § 1988.

13 Under current law, in order for the government to recover attorney fees in a 42 U.S.C. § 1983
14 action, the government must prove that a plaintiff acted in either an unreasonable, frivolous,
15 meritless, or vexatious manner. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

16 However, SB 1327 essentially nullifies 42 U.S.C. § 1988 when the action relates to the
17 Second Amendment litigation only; the intent of which is clear.

18 Therefore, because SB 1327 abrogates a federal statutory right granted by Congress, the harm
19 is immediate and irreparable on the face of the statute, regardless as to what the government
20 promises not to do.

21 Plaintiff is entitled to the declaratory and injunctive relief sought because SB 1327 abrogates
22 § 1988.

23 F. The “promise” without acceptance is illusory and meaningless.

24 Unlike *Defense Distributed*, the “promise” is not the relief being sought. Plaintiff's counsel
25

1 made it perfectly clear that the relief being sought was a stipulated judgment prohibiting
2 enforcement of SB 1327 by “all individual and government defendants” in any action, past,
3 present, or future. O’Brien Decl., ¶ 2, **Exhibit “1”**. Other than Defendants Bonta and Newsom, no
4 other government defendant promised not to use the SB 1327 against Plaintiff and his attorneys.
5 Therefore, for complete relief, Plaintiff needs a declaration from this Court that SB 1327 is
6 unconstitutional on its face, and to enjoin the Defendants Bonta and Newsome from using SB
7 1327. This relief will obviously then benefit Plaintiff and the public by precluding all other
8 governmental bodies (including defendants in this case) from seeking attorney fees in Second
9 Amendment cases.

10 Defendants “promise” was illusory. Besides, it was not accepted. The promise is illusory
11 because SB 1327 violates the First Amendment---and Defendants cannot promise a fundamental
12 right. “An illusory promise is no promise at all and is not a sufficient consideration for a return
13 promise.” *Automatic Vending Co. v. Wisdom*, 182 Cal. App. 2d 354, 357 (1960).

14 A stipulation is agreement between counsel respecting business before court, and like any
15 other agreement or contract, it is essential that parties or their counsel agree to its terms. *Palmer*
16 *v. Long Beach*, 33 Cal. 2d 134(Cal. 1948); see also, Cal. Civ. Code § 1549.

17 Because there was no acceptance and no stipulation, and the promise was illusory, the
18 governments “promise” is unenforceable by Plaintiff in this action or any other action; and it is
19 not binding on any other party defendant in this case (i.e., Elk Grove and County of Sacramento).

20 In addition, there is a myriad of cases whereby the government promised not to do something
21 and does it anyway. (e.g., “Although the prosecution initially honored its promise to dismiss the
22 misdemeanor charge, it then breached the plea agreement by moving to amend the complaint to
23 charge Cuero’s prior assault conviction as a second strike.” *Cuero v. Cate*, 827 F.3d 879, 887 (9th
24 Cir. 2016).)

25

Again, the mere presence of the statute on the books causes irreparable harm as it chills First and Second Amendment rights, and thus, the “promise” is no relief at all because the law interferes with the attorney-client relationship by creating a natural conflict of interest and ineffective assistance of counsel. (**Gorski Decl.** ¶s 13, 16, **19-23, 27**, 33, 39, 42; **Abrera Decl.** ¶s 21, 25, 35, 41; **Karalash Decl.** ¶ 7, 11, 15.)

II. DEFENDANT FAILS TO APPLY THE *WINTER* FACTORS AS TO THE CHILLING EFFECT SB 1327 HAS ON PLAINTIFF’S FIRST AMENDMENT RIGHTS, THUS, DECLARATORY AND INJUNCTIVE RELIEF IS APPROPRIATE

Plaintiff’s First Amendment argument warrants a deeper analysis than what Defendants propose in their opposition in citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) in a vacuum. In light of the Ninth Circuit’s permissive case law regarding preliminary injunctive relief to protect First Amendment rights, it is appropriate to look at the chilling effect SB 1327 has not only on this litigation, but other cases Plaintiff may file as well as the public in general. See *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002), abrogated on other grounds by *Winter*, 555 U.S. 7; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983))

Both this court and the Supreme Court have repeatedly held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); *see also Sammartano*, 303 F.3d at 973-74; *S.O.C., Inc.*, 152 F.3d at 1148; *Jacobsen v. U.S. Postal Service*, 812 F.2d 1151, 1154 (9th Cir. 1987). The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as “timing is of the essence in politics” and “[a] delay of even a day or two may be intolerable” *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1020 (9th Cir. 2008) (quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984)). Klein has therefore demonstrated a likelihood of irreparable injury in the absence of an injunction.

We have also consistently recognized the “significant public interest” in upholding free speech principles, *see Sammartano*, 303 F.3d at 974 (collecting cases), as the “ongoing enforcement of the potentially

1 unconstitutional regulations . . . would infringe not only the free expression
2 interests of [plaintiffs], but also the interests of other people" subjected to
3 the same restrictions. *Id.*

4 *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009).

5 Defendant Newsom made it perfectly clear that “[w]e are sick and tired of being on the
6 defense in this movement. It's time to put them on the defense.”² [emphasis added] FAC ¶ 470.
7 Newsom has made it perfectly clear that he and Bonta are going on the offensive which can only
8 be construed that Defendants will pursue all remedies under SB 1327.

9 On September 26, 2022, The Attorney General states in an email, **Defendants Exhibit “2”**,
10 conditions enforcement of SB 1327 only if he withdraws his claims for relief, and this is only
11 relating to the “present” lawsuit.

12 Plaintiff’s will suffer irreparable injury if there is not a declaration from this court that AB
13 1327 is unconstitutional because Plaintiff’s attorney, Dan Karalash, will be forced to withdrawal
14 from representing Plaintiff in this case, the criminal case, and future cases pertaining to Second
15 Amendment litigation. Likewise, Mr. Gorski’s objectivity will be tainted since he will be exposed
16 to the prospect of being liable for hundreds of thousands of dollars in attorney fees from state,
17 county, and municipal defendants. SB 1327 has a coercive impact on Plaintiff’s relationship with
18 his attorneys, which causes an inherent conflict of interest which cannot be remedied without a
19 finding that the AB 1327 is unconstitutional. The mere potential of a monetary penalty has a
20 chilling impact on Plaintiff’s, and the publics ability to exercise their First Amendment rights.
21

22 **(Gorski Decl. ¶s 13, 16, 19-23, 27, 33, 39, 42; Abrera Decl. ¶s 21, 25, 35, 41; Karalash Decl. ¶**
23 7, 11, 15.) (professing the potential for bankruptcy and stating that the threat of such a attorney
24 fee awards fine has intimidated Plaintiff and his attorneys to seriously consider whether they
25 should pursue Second Amendment rights.) In the Ninth Circuit, "a party seeking preliminary
26 injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit
27

28 ² “Them” is obviously “people” asserting their Second Amendment rights.

1 the grant of relief by demonstrating the existence of a colorable First Amendment
2 claim." *Sammartano*, 303 F.3d at 973 (quoting *Viacom Int'l, Inc. v. F.C.C.*, 828 F. Supp. 741
3 (N.D. Cal. 1993)).

4 It is well settled that "demonstrating the existence of a colorable First Amendment claim" is
5 less exacting than the *Winter* and *Cottrell* standards, and that Plaintiff has easily demonstrated the
6 existence of a colorable First Amendment claim, Plaintiff is likely to succeed on the
7 merits, *see Sammartano*, 303 F.3d at 973; *see also Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir.
8 1989) ("[T]he assertion of First Amendment rights does not automatically require a finding of
9 irreparable injury"); *see also Dex Media*, 790 F. Supp. 2d at 1280 (acknowledging that in the
10 First Amendment context, the "determination of whether Plaintiffs have demonstrated a
11 likelihood of irreparable harm . . . hinges in part on whether Plaintiffs have demonstrated a
12 likelihood of success on the merits of their First Amendment claim"). Moreover, because the
13 potential harm to Plaintiffs is not just pecuniary. SB 1327 will impact Plaintiff's decision-making
14 process in determining whether his Second Amendment right is really worth protecting. In
15 addition, SB 1327 has already affected his attorneys' judgment and counsel. (**Gorski Decl.** ¶s 13,
16, 19-23, 27, 33, 39, 42; **Abrrera Decl.** ¶s 21, 25, 35, 41; **Karalash Decl.** ¶ 7, 11, 15.)
17 Preliminary injunctive relief would have a discernable impact on Plaintiff's attorneys decision-
18 making calculus, as well as his own decision-making calculus.
19

CONCLUSION

20 AB 1327 (C.C.P. § 1021.11) is unconstitutional and imposes enormous and irreparable harms
21 on the people of California, and Plaintiff in particular.
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Respectfully submitted,
LAW OFFICES OF GARY W. GORSKI
/s/ Gary W. Gorski
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